

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee  
Hon. Mary Ann Grilli and Hon. Michael Nash, Co-chairs  
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DATE: September 10, 2003

SUBJECT: Family Law: Motion to Quash and Application for Court Order  
(adopt rule 5.121, amend rules 5.118 and 5.120) (Action Required)

Issue Statement

Amending rules 5.118 and 5.120 and adopting new rule 5.121 would clarify the procedures relating to a motion to quash, clarify that the court may grant or deny relief sought on a motion solely on the basis of the application and responses, and also correct certain technical errors.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2004, adopt rule 5.121 and amend rules 5.118 and 5.120.

The proposed rules are attached at pages 4–5.

Rationale for Recommendation

The California Rules of Court regarding family law were rewritten and renumbered as of January 1, 2003. These changes were designed to follow the Judicial Council’s new numbering system, to reflect recent changes in the law and procedure, and to make the rules easier to read and more accessible to court users. No substantive changes were intended with the revision.

The rules that refer to procedures set out in the Code of Civil Procedure—such as a motion to quash proceeding, availability of lis pendens, and similar actions—were deleted as unnecessary. Rule 5.140 (Implied procedures) further states that “if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules.”

Thus, procedures relating to a motion to quash, which is in the nature of a special demurrer, were eliminated because they are already discussed in the Code of Civil Procedure. The motion to quash continued to be specifically authorized by rule 5.120(a)(3) on appearances, which states that the motion constitutes a general appearance.

However, Code of Civil Procedure section 418.10 was amended as of January 1, 2003 (Sen. Bill 1325; Stats. 2002, ch. 69) to provide that a defendant may simultaneously file a motion to quash service of summons or a forum non conveniens motion and an answer (or motion to strike) without making a general appearance. Under section 418.10, the simultaneously filed answer is held in abeyance until disposition on the motion to quash summons; the filed answer amounts to a general appearance only upon entry of an order denying the motion to quash summons or upon final conclusion of the writ proceedings if defendant petitioned for writ review of the denial.

Rule 5.120 is now in conflict with revised section 418.10. It should be amended to provide that filing a motion to quash does not constitute a general appearance and to set out the time frames for responding to such a motion.

Proposed rule 5.121 (Motion to quash proceeding or responsive relief) restates former rules 1230, 1232, and 1239, repealed January 1, 2003, which all covered motions to quash. It is intended to clarify that motions to quash are permitted and to coordinate with amended rule 5.120.

Previous rule 1225 provided that a court may grant or deny relief sought in a motion solely on the basis of the application and responses and any accompanying memorandum of points and authorities. That section was removed since it appeared to restate well-established case law in this area. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479.) However, the Judicial Council has received requests to reinstate this rule to assist in the administration of justice. That proposed reinstatement is set out in amended rule 5.118.

#### Alternative Actions Considered

No viable alternative actions appear to exist.

#### Comments From Interested Parties

An invitation to comment was circulated to the Administrative Office of the Court's main mailing list of presiding judges and court executives, the State Bar, and other groups interested in the administration of justice. In addition, it was circulated to all family law facilitators, family law information centers, child support commissioners, and legal services programs, as well the Family and Juvenile Law Advisory Committee's list of family law practitioners. Eight written comments were received.

Five of the comments approved of the changes without amendment. One commenter noted that there was still a contradiction with revised Code of Civil Procedure 418.10. The committee has recommended an additional revision to 5.120(a)(1) to clarify that a response or answer filed accompanying a motion under Code of Civil Procedures section 418.10 does not constitute an appearance.

One commenter suggested that the committee should specify what motions require a memorandum of points and authorities. The committee decided that, given the varying types of motions brought in family law, such an undertaking is not possible.

Another commenter suggested that Rule 5.121(d), which states that the basis for motions to quash would be waived if not filed in a timely manner, should not include residency because without residency the court does not have jurisdiction. However, Code of Civil Procedure section 418.10 (e)(3) specifically states that “Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution.” Thus, the committee declined to recommend changes to this rule.

The comment chart is attached at pages 6–8.

#### Implementation Requirements and Costs

The only costs associated with this proposal involve printing of revised rules.

#### Attachments

Rules 5.118 and 5.120 of the California Rules of Court are amended, and rule 5.121 is adopted, effective January 1, 2004, to read:

**Rule 5.118. Application for court order**

(a)–(e) \* \* \*

(f) The court may grant or deny the relief solely on the basis of the application and responses and any accompanying memorandum of points and authorities.

**Rule 5.120. Appearance**

(a) A respondent or defendant appears in a proceeding when he or she files:

(1) A response or answer, except as provided in section 418.10 of the Code of Civil Procedure.

(2) \* \* \*

~~(3) A notice of motion to quash the proceeding based on:~~

~~a. Petitioner's lack of legal capacity to sue,~~

~~b. Prior judgment or another action pending between the same parties for the same cause,~~

~~c. Failure to meet the residence requirement of Family Code section 2320, or~~

~~d. Statute of limitations in Family Code section 2211;~~

~~(4)(3)~~ \* \* \*

~~(5)(4)~~ \* \* \*

(b)–(c) \* \* \*

**5.121 Motion to quash proceeding or responsive relief**

(a) Within the time permitted to file a response, the respondent may move to quash the proceeding, in whole or in part, for any of the following:

(1) Lack of legal capacity to sue,

1  
2 (2) Prior judgment or another action pending between the same parties  
3 for the same cause,

4  
5 (3) Failure to meet the residence requirement of Family Code section  
6 2320, or

7  
8 (4) Statute of limitations in Family Code section 2211.

9  
10 (b) The hearing for any notice of motion to quash must be scheduled not  
11 more than 20 days from the date the notice is filed. If the respondent  
12 files a notice of motion to quash, no default may be entered and the time  
13 to file a response will be extended until 15 days after service of the  
14 court's order.

15  
16 (c) Within 15 days after the filing of the response, the petitioner may move  
17 to quash, in whole or in part, any request for affirmative relief in the  
18 response for the grounds set forth in (a).

19  
20 (d) The parties are deemed to have waived the grounds set forth in (a) if  
21 they do not file a motion to quash within the time frame set forth.

22  
23 (e) When a motion to quash is granted, the court may grant leave to amend  
24 the petition or response and set a date for filing the amended pleadings.  
25 The court may also dismiss the action without leave to amend. The  
26 action may also be dismissed if the motion has been sustained with  
27 leave to amend and the amendment is not made within the time  
28 permitted by the court.

**SPR03-45**

**Family Law: Motion to Quash and Application for Court Order**  
 (adopt rule 5.121, amend rules 5.118 and 5.120)

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Mr. Grant Barrett General Counsel Superior Court of Calaveras County	A	N	“Yeah, to the reappearance of 5.118(f)! Good work on clarifying rules.”	No response required.
2.	Hon. Kathleen Bryan Commissioner Superior Court of San Bernardino County	A	N	Agree	No response required.
3.	Mr. Robert Gerard President Orange County Bar Association	A	Y	Agree	No response required.
4.	Ms. JoAnn Johnson Family Law Facilitator Superior Court of Ventura County	A	N	Agree with proposed changes.	No response required.
5.	Ms. Linda Diamond Raznick The Rutter Group	AM	N	I’m glad to see new Rule 5.121 would restore the grounds for a motion to quash the proceeding. However, I don’t think these proposals fix one of the big issues. Specifically, revising rule 5.120(a) to eliminate “motion to quash the proceeding” as a basis for a general appearance still does not reconcile Rule 5.120(a) with amended Code Civ. Proc. § 418.10. Rule 5.120(a), as proposed, would still say a respondent appears by filing a response (or answer). But 418.10(e) says filing an answer along with a motion to quash service of summons does not constitute an appearance until final disposition (denying) the motion to quash service of summons. In other words, we aren’t fixing the conflict between	Agree. Propose that 5.120 (a) (1) be amended to read “ (1) A response or answer, except as provided in section 418.10 of the Code of Civil Procedure.”

### SPR03-45

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				rule 5.120(a) and 418.10(e) by eliminating a motion to quash the proceeding from the methods by which a respondent “appears.” Seems to me we need to revise rule 5.120(a)(1) to indicate it’s subject to 418.10(e) (or otherwise spell out what’s in 418.10(e)).	
6.	Diana Doreme Attorney Chair of the Executive Committee of the Family Law Section of the State Bar	A	A	Approve	No response required.
7.	Stephen Love Executive Officer Superior Court of San Diego County	AM		Rule 5.121(d) states that the basis for motions to quash would be waived if not filed in a timely manner. They include FC 2320 which covers residency for purposes of filing a dissolution of marriage. That is not a waivable item as the court simply does not have jurisdiction to make a ruling re: dissolution unless the residency requirement has been met. (see Fam. Code § 2320(a)(3).)	Code Civ. Proc. § 410.10 (e) (3) states that “Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of <b>lack of personal jurisdiction</b> , inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution.” (bold added)  <u>Zaragoza v. Superior Court</u> , 49 Cal.App.4th 720 (1996), which interpreted rule 1230, on which rule 5.121 is based, holds that jurisdictional issues can be waived.
8.	Cynthia A. Denenholz Superior Court of Sonoma County	AM		The addition of Rule 5.118(f) is a good idea.  Rule 5.118 should be changed further to include specific motions in which a memorandum of points and authorities would be required, other than on a	No response required.  The general guideline in the rules is that points and authorities should not be required except in extraordinary cases. The

**SPR03-45**

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				<p>case-by-case basis. With the exception of discovery proceedings, under Cal. Rules of Court, rules 301 and 303(a)(1), the general law and motion rules do not apply in family law cases. While rule 303(a)(2) is not entirely clear, it is doubtful that the general law and motion rules even apply to the proceedings set forth therein.</p> <p>The court does not have an opportunity to review an application until shortly before the time set for hearing; by then, it is too late to require that the parties provide points and authorities, absent a continuance. Points and authorities should be required to support certain motions in which research is necessary, such as those to set aside a judgment or to quash a proceeding.</p>	<p>standard of requiring points and authorities “where research is required” seems too broad. The idea of trying to delineate each motion where they would be needed seems like a difficult endeavor, given the various permutations of family law. In the situation described, perhaps the court could ask the parties to prepare points and authorities after initial argument of the motion and either ask the parties to return or agree to make a determination after briefing.</p>